Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
Rule and Policies Concerning Multiple Ownership Of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

PETITION FOR RECONSIDERATION OF OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, INC., BLACK CITIZENS FOR A FAIR MEDIA, PHILADELPHIA LESBIAN AND GAY TASK FORCE, AND WOMEN'S INSTITUTE FOR FREEDOM OF THE PRESS

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SUMMARY

UCC *et al.* ask the Commission to reconsider the entire Order to conduct a proper analysis of its fundamental statutory obligation to ensure that broadcasters serve the public interest. The new rules do not ensure that the public will have the information necessary to fully participate in democratic society. Moreover, the Order fundamentally misapplies the First Amendment law in placing the rights of the broadcast licensees above the First Amendment rights of the public. The Order also fails to consider some of the traditional public interest goals, such as the impact of the new rules on opportunities for minorities and women to own stations, or construes the goals of diversity and localism in an unduly narrow manner. Thus, the Commission should reassess and revise the ownership rules so that they serve the public interest, as traditionally understood, rather than the pecuniary interests of broadcasters or the administrative convenience of the agency.

The Order also adopts, without any analysis of its own, the *Fox* Court's erroneous conclusion that Section 202(h) "upends" traditional administrative law principles and imposes a deregulatory presumption. On reconsideration, the FCC must comply with the Supreme Court's interpretation of the administrative law requirements set forth in *State Farm* and independently analyze of Section 202(h) based on the text and legislative history and in light of its own interpretation of similar language in other contexts. The entire order should then be reconsidered in light of the proper legal standard.

The Commission should also reconsider each of the specific rules that were changed by the Order. Because the new local television rule fails to ensure viewpoint diversity and adequate competition, it should be modified. The Commission should also reconsider its use of DMAs as the relevant unit of analysis and the inclusion of noncommercial stations, since both can lead to

unintended and bizarre results. And, the Commission should change the waiver test to promote new entry.

The Commission should also revise the numerical limits for local radio because the current rules have allowed excessive concentrations of market power. Moreover, while use of Arbitron Metro markets is appropriate, the FCC should not count noncommercial stations for purposes of the cap because this effectively allows additional concentration in already concentrated markets.

UCC *et al.* request that the Commission also re-evaluate its decision to eliminate the newspaper-broadcast cross ownership rule and replace it with the extremely lax Cross Media Limit. As the Supreme Court found, the cross-ownership rule is needed to protect the public interest in diverse and antagonistic viewpoints. Moreover, the Cross Media Limit lacks any validity because it is based on a series of improper or false assumptions.

UCC *et al.* ask that the Commission reconsider its decision to raise the national audience limit to 45%. The conclusion that the 35% limit no longer is necessary is based on a faulty and incomplete analysis. Moreover, in reality, the 45% limit is a 90% limit because of the Commission's irrational decision to retain the obsolete UHF discount.

Finally, the Commission should reconsider its decision not to ensure opportunities for the public to watch independently produced programming.

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Pursuant to Section 1.429 of the Commission's Rules, the Office of Communication of United Church of Christ, Inc., Black Citizens for a Fair Media, Philadelphia Lesbian and Gay Task Force, and Women's Institute for Freedom of the Press ("UCC *et al.*"), by their attorneys, the Institute for Public Representation ("IPR"), respectfully ask the Commission to reconsider its Order in the above-captioned proceeding.

In Parts I and II of this Petition for Reconsideration, UCC *et al*. point out fundamental flaws in the Commission's overall approach that require reconsideration of all the new rules. In Parts III to VII, the Petition discusses problems with the Commission's analysis of individual rules and makes some specific proposed modifications.

I. THE NEW RULES FAIL TO ENSURE THAT BROADCASTERS WILL SERVE THE STATUTORILY MANDATED GOALS OF THE PUBLIC INTEREST.

UCC *et al.* ask the Commission to reconsider all of the ownership rules at issue in this Order in light of its fundamental obligation under the Communications Act to serve the public interest. Unfortunately, the Order fails to fully analyze how the new rules will affect traditional public interest goals, and instead is unduly concerned with ensuring the profitability of broadcasters[1] and increasing the administrative convenience of the agency.[2]

A. The Order fails to analyze how the new rules will affect the rights of members of the public to express their views and to receive information necessary to actively participate in a democratic society.

A key concern of the Communications Act is to ensure that the public has information necessary to fully participate in a democratic society. For example, Section 315 requires that stations afford equal opportunities to all qualified candidates for a particular public office if it affords access to one, and Section 312(a)(7) requires that stations give reasonable access to candidates for federal public office.

The new rules limit public access to important information in a variety of ways. For example, if a candidate seeks to get his or her message before the public and is turned down by one station can typically turn to other stations. However, with far fewer owners, candidates may find it harder to get their messages out to the public.

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[1] *See, e.g.* Order at ¶ 147 stating that new rules will enhance ability of broadcasters to compete with cable and DBS; Order at ¶ 150 explaining that new rules will lead to higher ratings; Order at ¶ 151 stating that current rules hinder ability to compete for advertising revenues.

[2] *See, e.g.* Order at ¶¶ 82-3 explaining that part of the reasoning to implement "bright-line" rules is to increase the Commission's efficiency and conserve the agency's resources and manpower. *Id*.

Advocacy groups will have an even more difficult time expressing their views to the public. For example, Wal-Mart recently demanded that five St. Louis area radio stations stop running a commercial paid for by a local union.[3] With fewer and fewer owners, it will be more difficult for labor unions, other advocacy groups, and even community groups seeking to present public service announcements, to find stations willing to air their messages. Thus, both the First Amendment rights of these persons to express their views and the public's right to hear a diversity of views, are restricted by the new rules.

The NPRM at least asked about the impact of ownership rules on national elections.[4] But the Order does not answer this question; it does not even consider the impact of the ownership rules on any elections, whether national, state or local. Nor does it address important questions raised in Commissioner Adelstein's dissent, such as whether the limited broadcast coverage may account for depressed voter turnout, and whether allowing greater media concentration would result in more or less time being dedicated to serious coverage of candidates and issues.[5]

Similarly, the Order fails to consider the overall effect of the rule changes on the amount and diversity of news in local markets, even though it acknowledges that local news is a major focus of its public interest analysis.[6] The Order places great weight on the much-criticized MOWG Study No. 7, which found that broadcast stations owned by newspapers provide greater quantity and quality of local news.[7] But even assuming *arguendo* that the study's findings are correct, it does not follow that the public interest is necessarily better served by allowing extensive cross-ownership. As cross-ownership becomes the norm, other television stations may

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[3] Wal-Mart Urges Five Stations to Drop Union's Radio Spots, St. Louis Dispatch, Aug. 14, 2003. The ads criticized the company's treatment of workers.
[4] NPRM, 17 FCC Rcd 18503, 18553-54 (2002).
[5] Adelstein dissent at 6.
[6] Order at ¶¶ 34-35.
[7] *See, e.g.*, Order at ¶ 343.

stop producing news altogether. Because the Order fails to even address these important public interest questions, all of the new rules need to be reviewed with these goals in mind.

B. The Order Fundamentally Misperceives the Nature of the First Amendment Issues at Stake.

The Order appropriately concludes that its rules must be consistent with the First Amendment and that "rational basis is the correct First Amendment standard to apply to the broadcast ownership rules."[8] But in assessing the consistency of the new rules with the First Amendment, the Order addresses the First Amendment rights of broadcast licensees (and would-be licensees) as *speakers* but ignores the First Amendment rights of viewers, listeners, and the vast majority of the American public who cannot get broadcast licenses. In so doing, it turns on its head the First Amendment law as applied to broadcasting by the Supreme Court decisions going back many decades. The Supreme Court has made it clear that the Commission must balance the First Amendment rights of broadcast licensees as speakers with the rights of the public (and sometimes other speakers).[9] And to the extent that those rights conflict, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[10]

For example, in developing the new Cross Media Limit (CML), the Order asserts that it must draw cross-media limits as narrowly as possible to impose the least possible burden on newspapers that may seek to own and operate broadcast outlets.[11] It does not even mention the

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[8] Order at ¶ 13.
[9] For example, in *CBS, Inc. v. FCC*, the Supreme Court rejected broadcasters' claims that the Commission's implementation of § 312(a)(7)'s access for federal candidates violate their First Amendment rights and that the Commission's application of the section "properly balances the First Amendment rights of federal candidates, the public, and broadcasters." 453 U.S. 367, 397 (1981). *See also Columbia Broadcasting Systems, Inc. v. Democratic Nat'l Comm.,* 412 U.S. 94, 102 (1973); *FCC v. Nat'l Citizens Comm. For Broadcasting,* 436 U.S. 775, 801-02 (1978).
[10] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). *See also Columbia Broadcasting Systems, Inc. v. Democratic Nat'l Comm.,* 412 U.S. at 122.
[11] Order at ¶ 441. *See also* id. at ¶ 179.

impact that having the same company control both the only daily newspaper and the television stations with the top-ranked news programming has on viewers' and listeners' First Amendment interest in the "the widest possible dissemination of information from diverse and antagonistic sources."[12]

In the context of the local television rules, the Commission pays mere lip service to the public's First Amendment interests, stating that it does "not … necessarily disagree with those who maintain that a local television ownership cap can help to protect the public's First Amendment interest in a robust marketplace of ideas."[13] But it then claims that maintaining a local television limit to promote diversity "cannot be squared with … our desire to minimize the impact of our rules on the *rights of speakers* to disseminate messages."[14] Thus, instead of following the Supreme Court precedent that the public's First Amendment rights are paramount, the Order gives primacy to the rights of licensees.

C. The Commission has Misconstrued the Traditional Public Interest Goals of Diversity and Localism.

Although the Commission has correctly identified diversity, localism, and competition as important public interest goals, it has inappropriately narrowed or construed these goals in a manner that is inconsistent with traditional conceptions. The Commission should reassess and revise its rules based on proper understanding of these goals.

[12] *Associated Press v. United States*, 326 U.S. 1, 20 (1945).
[13] Order at ¶ 179.
[14] *Id*. (emphasis added).

1. The Public Interest Goal of Diversity has been Inappropriately Narrowed and Subordinated to Competition Goals.

The Order identifies five types of diversity that are pertinent to media ownership policy: "viewpoint, outlet, program, source and minority and female ownership diversity."[15] It concludes that viewpoint diversity, which "refers to availability of a wide range of information and political perspectives on important issues," is "a paramount objective of the Commission because the free flow of ideas under-girds and sustains our system of government."[16] It also finds that the record supports its traditional assumption of a link between ownership diversity and viewpoint diversity.[17] It concludes that in analyzing viewpoint diversity, it is appropriate to focus on diversity in local news, and that television stations and daily newspapers are the sources used most often for local news.[18]

UCC *et al.* agree that the Commission's paramount concern should be ensuring diversity in local news programming. However, just because that concern is paramount does not mean that the other types of diversity are irrelevant or can be ignored. We are particularly concerned that the Commission completely fails to analyze whether programming needs of all segments of the community will be met and to assess the impact of the new rules on opportunities for minorities and women to own broadcast stations.[19]

Even in its analysis of viewpoint diversity, the Commission improperly subordinates diversity to competition. Historically, the ownership rules furthered the public interest by

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[15] *Id*. at ¶ 18.
[16] *Id*. at ¶¶ 393, 32, 198.
[17] *Id*. at ¶ 27.
[18] *Id*. at ¶¶ 34-35, 342. For example, in its examination of cross ownership rules, the Commission recognizes that "[n]ews and public affairs programming is the clearest example of programming that can provide viewpoint diversity." *Id*. at ¶ 394.
[19] UCC *et al*. agree with NOW that the failure to address this important public interest goal requires reconsideration.

maximizing the number of owners, thus promoting *both* competition and diversity.[20] But here, the Commission assumes that if the rules are sufficient to ensure competition, they will automatically ensure diversity. It explains:

> because markets defined for competition purposes (*i.e.*, defined in terms of which entities compete with each other in economic terms) are generally more narrow than markets defined for diversity purposes (*i.e.*, defined in terms of which entities compete in the dissemination of ideas), our ownership limits on radio and television ownership also serve our diversity goal. By ensuring that several competitors remain within each of the radio and television services, we also ensure that a number of independent outlets for viewpoint will remain in every local market, thereby ensuring that our diversity goal will be promoted.[21]

This premise – that markets for economic competition (i.e. sale of advertising) are narrower than markets for diversity purposes (i.e. news and public affairs) -- is demonstrably untrue. Every commercial broadcast station sells advertising time. Yet, not all commercial stations air local news programming.[22] So if anything, economic markets are broader than diversity markets.[23] Because the assumption that ensuring competition alone will ensure

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[20] As the Commission found in a previous Biennial Review,

> For more than a half century, the Commission's regulation of broadcast service has been guided by the goals of promoting competition and diversity. These goals are separate and distinct, yet also related … Competition is an important part of the Commission's public interest mandate, because it promotes consumer welfare and the efficient use of resources and is a necessary component of diversity. Diversity of ownership fosters diversity of viewpoints, and thus advances core First Amendment principles … Promoting diversity in the number of separately owned outlets has contributed to our goal of viewpoint diversity by assuring that the programming and views available to the public are disseminated by a wide variety of speakers." *1998 Biennial Review of the Commission's Broadcast Ownership Rules*, MM Docket No. 98-35, 15 FCC Rcd 11058 at ¶ 5 (2000).

In addition, the Supreme Court noted that "[f]ederal policy … has long favored preserving a multiplicity of broadcast outlets regardless of whether the conduct that threatens it is motivated by anticompetitive animus or rises to the level of an antitrust violation." *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 194 (1997).

[21] Order at ¶ 129.

[22] Order at ¶ 159.

[23] In our reply comments, we explained in greater detail why competition in economic markets will not necessarily result in competition in the marketplace of ideas. UCC Reply Comments at 9-13. However, the Order does not address these arguments.

diversity is wrong, the Commission must reconsider the rules and analyze the impact on diversity separately from its analysis of competition.

2. The Public Interest Goal of Localism Has Been Construed Too Narrowly.

The public interest goal of localism has traditionally been concerned with ensuring that broadcast licenses are allocated to communities on an equitable basis and that those stations, in turn, serve the needs of their community of license by providing community-oriented programming, opportunities for discussion of local issues, access for candidates for local public office, opportunities for local residents to express themselves, and the development of local talent.[24] The comments of UCC *et al.* included letters from local non-profit community groups describing how their ability to engage in public education and advocacy had already been diminished by media consolidation and would be further injured by greater consolidation.[25] But instead of addressing the concerns of community groups and considering the entire range of localism issues, the Order arbitrarily measures localism solely "on two measures: the selection of programming responsive to local needs and interests, and local news quantity and quality."[26]

Even on this limited basis, the Commission's findings are fundamentally flawed. For example, it assumes that allowing greater consolidation will promote localism by giving stations greater resources to provide more or better quality local news.[27] However, the Commission provides no way to ensure, or even find out, whether consolidated media outlets will use cost savings to provide more or better local news and public affairs. On reconsideration, the Commission should reassess the new rules under the traditional goals of localism. To the extent

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[24] *See* UCC Comments at 14-15. Adelstein dissent at 11.
[25] UCC Comments at 15-16 & Exhibit 1.
[26] Order at ¶ 78.
[27] *Id*. at ¶¶ 160, 161, 164.

its rules are based on assumptions about how cost savings will be used, the Commission should ensure that the savings will be used to benefit the public.

D. The Commission Should Reconsider its Refusal to Consider Challenges to Transfers in Compliance with the Rules.

The new rules violate Sections 309 and 310 of the Communications Act of 1934, as amended. These sections direct the Commission to approve applications to transfer or assign broadcast licenses only where it makes an affirmative finding that the grant will serve the public interest, convenience and necessity.[28] However, the new rules on their face allow the Commission to approve transfers that are not in the public interest.

The Order admits that "bright line rules" "may be over-inclusive, by preventing transactions that would result in increased efficiencies, or under-inclusive, by allowing transactions that would raise concerns, if the circumstances of the case were reviewed."[29] Because the Commission recognizes that some transactions that violate the rules may nonetheless serve the public interest, it commits to consider requests for waiver of its rules from applicants.[30] However, the Commission fails to ensure that the public interest is served where the rule is underinclusive by refusing to subject applications proposing transactions not barred by the CML to anything more than "routine Commission review," and refusing to consider how the Diversity Index applies to particular transactions.[31]

Refusing to consider challenges to transactions consistent with rules that may nonetheless contravene the public interest makes it easy for the Commission to process transfer applications. However, because it does not serve the public interest or comply with the Commission's

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[28] 47 U.S.C. §§ 309(a) & (e), 310(d).
[29] Order ¶ 84.
[30] *See, e.g.*, *Id.* at ¶ 227.
[31] *Id.* at ¶¶ 453, 481.

statutory obligations, the Commission must reconsider its "bright-line" approach.

II. THE COMMISSION FAILED TO PROPERLY INTERPRET SECTION 202(H)

On reconsideration, the FCC must also properly analyze the meaning of Section 202(h) and analyze all of the ownership rules using the proper interpretation of the statute. The Order provides *no* legal analysis considering the proper interpretation of Section 202(h), despite the fact that the meaning of this section was debated extensively in the comments. The whole section entitled "Legal Framework" is only seven paragraphs long, and four of those paragraphs are dedicated to the appropriate First Amendment analysis.[32] Of those three paragraphs, the first sets out the text of Section 202(h), and the third is a two-sentence conclusion. The entire analysis is contained in one paragraph:

> Two aspects of this statutory language are particularly noteworthy. First, as the court recognized in both *Fox Television* and *Sinclair,* "Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules." That is, Section 202(h) appears to upend the traditional administrative law principle requiring an affirmative justification for the modification or elimination of a rule. Second, Section 202(h) requires the Commission to determine whether its rules remain "necessary in the public interest."[33]

This analysis is inadequate for several reasons. First, the FCC fails to address the argument of commenters that Section 202(h) could not and did not "upend administrative law principles" established by the Supreme Court that changes to agency rules must be affirmatively supported. Second, the FCC fails to conduct its own analysis of the statutory language and legislative history. It also fails to recognize that its conclusions here are inconsistent with its interpretation of a virtually identical statutory clause governing biennial reviews for telecommunications industries. Finally, the FCC unquestioningly accepts the *Fox* Court's interpretation that 202(h) carries a deregulatory presumption, even though this determination was

[32] *Order* at ¶¶ 10-16.
[33] *Id.* ¶ 11 (footnotes omitted).

made on an incomplete record, and in other cases where a court has interpreted the statute based on an incomplete record, the FCC has not considered itself to be bound by that determination.

A. The FCC Failed to Address Arguments that Section 202(h) was Never Intended to Overturn Supreme Court Precedent.

The Consumers Union's (CU) comments in Docket 01-235 explained that existing Supreme Court precedent did not allow the Commission to reverse the long-standing burdens of proof established under the Administrative Procedure Act (APA).[34] CU showed that the modification of a pre-existing rule is governed by the standard set forth by the Supreme Court in *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.* ("*State Farm*").[35] CU quoted the following passage from *State Farm*:

> Revocation constitutes a reversal of the agency's former views as to the proper course. A "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to." .... *Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.*
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> .... [T]he forces of change do not always or necessarily point in the direction of deregulation. In the abstract, there is no more reason to presume that changing circumstances require the rescission of prior action, instead of a revision in or even the extension of current regulation. If Congress established a presumption from which judicial review should start [in the Administrative Procedure Act], that presumption ... is ... against changes in current policy that are not justified by the rulemaking record.[36]

[34] Comments of Consumers Union, et al.,MM Docket 01-235, at 22-26 (filed Dec. 2, 2001) ("CU Comments"). *See also* Comments of Consumer Federation of America, *et al.*, MB Docket 02-277, at 13-16 (filed Jan. 2, 2003).
[35] 463 U.S. 29 (1983)
[36] CU Comments at 23-24, quoting 463 U.S. at 41-42 (emphasis added).

The *State Farm* analysis is applicable to every rule the Commission changed in the Order. Thus, Commission rules may not be relaxed or eliminated unless the Commission demonstrates the wisdom of a new approach and overcomes the presumption that the prior course is valid.

The Commission's summary conclusion that Section 202(h) "upends" *State Farm* does not acknowledge the legal precedent strongly disfavoring implied repeal of Supreme Court holdings, particularly in the area of statutory interpretation. Neither the text or legislative history of Section 202(h) states that the ordinary burdens of proof do not apply under Section 202(h) or that the section was intended to overturn *State Farm.* There is simply no discussion of typical standards of administrative procedure in the Section or the Act.

Thus, to conclude that 202(h) "upends" *State Farm* and the APA, one must resort to inferences. But repeal of statutes or Supreme Court precedent through inferences or other indirect means is virtually always improper. Generally, in "the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.'"[37] Similarly, agencies, like lower courts, should not assume a later Supreme Court decision has impliedly repealed an earlier one:

> if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.[38]

[37] *See TVA v. Hill*, 437 U.S. 153, 190 (1978). *See also Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 381 (1996) ("The rarity with which we have discovered implied repeals is due to the relatively stringent standard for such findings, namely, that there be an "irreconcilable conflict'" between the two federal statutes at issue."); *Morton v. Mancari*, 417 U.S. 535, 549 (1974); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963); *Posadas v. National City Bank*, 296 U.S. 497 (1936).

[38] *Agostini v. Felton*, 521 U.S. 203, 237 (quotations omitted).

Stare decisis has special force in statutory interpretation, such as the Supreme Court's holding in *State Farm,*[39] and in particular, where applied to a bedrock Supreme Court decision interpreting of a statute with such broad application as the Administrative Procedure Act.

B. The Text of Section 202(h) Does Not Support a Deregulatory Bias.

Not only does Section 202(h) not upend traditional APA principles, but there is nothing in the text supporting a deregulatory presumption. Section 202(h) states that the Commission "shall determine whether any of such rules are necessary in the public interest as the result of competition," and directs the Commission to "repeal or modify" any regulation it determines to be "no longer in the public interest."[40] The text does require the Commission to review its ownership rules biennially, but it does not direct any particular outcome of that review. Moreover, by directing the Commission to "repeal or modify" regulations that are not in the public interest, the statute appears to recognize that, absent this Congressional direction, many Commission rules would naturally remain in effect.

Some commenters argued that the term "necessary" in the first sentence of the statute to require an increased level of review and the radical shifting of administrative law. But the Commission itself has held, in a decision released March 14, 2003, that the word "necessary" cannot bear this weight. When it analyzed Section 11, the nearly-identical biennial review

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[39] *Patterson v. McClean Credit Union*, 491 U.S. 164, 172-73 (1989) (declining to overrule its previous statutory interpretation because change in prior interpretation inappropriate absent direct Congressional directive).

[40] *See* 47 U.S.C. §161; Telecommunications Act of 1996, Pub. L. No. 104-104, §202(h), 110 Stat 56, 112 (1996) ("§202(h)").

provision governing telecommunications rules,[41] the Commission concluded that the provision does not require a higher standard.[42]

The Commission's decision considering Section 11 could not be more relevant to interpreting Section 202(h). There, the Commission found "no evidence that Congress intended to impose a new or higher standard for what is 'necessary in the public interest' for purposes of Section 11 review."[43] The Commission rejected arguments that the term "necessary" meant "essential" or "indispensable."[44] The Commission analyzed the legislative history of Section 11 and concluded that the conferees did "not utilize language that suggests absolute necessity or indispensability."[45] The Commission also concluded that holding Section 11 contained a higher standard would conflict with the Commission's general rulemaking authority.[46] Finally, the Commission found, in express contradiction to the *Fox* court's apparent conclusion, that the

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[41] Section 202(h) is an uncodified section of the 1996 Telecommunications Act. Section 202(h) by its terms refers to Section 11 of the Communications Act, which was also adopted as part of the 1996 Act. Section 202(h) states: "The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934...." 110 Stat 56, 112 (1996). Both statutes contain virtually identical provisions. Section 202(h) states the Commission "shall determine whether any ... rules are *necessary in the public interest as the result of competition* and directs that "[t]he Commission *shall repeal or modify any regulation* it determines to be *no longer in the public interest.*" By contrast, Section 11 states, the Commission "shall determine whether any such regulation is *no longer necessary in the public interest ... as the result of meaningful economic competition*"and "*shall repeal or modify any regulation it determines to be no longer necessary in the public interest.*" The core difference is the repetition of the word "necessary" in Section 11, and the different wording used to describe competition in the two provisions. *Compare* 110 Stat 56, 112 (1996) *with* 47 U.S.C. § 161.

[42] *Report*, 2002 Biennial Regulatory Review, 18 FCC Rcd. 4726, 4730, ¶¶ 12-22 (2003) ("*2002 Biennial Order*").

[43] *2002 Biennial Order* at ¶ 13.

[44] *Id*. at 4730-32, ¶¶ 14-15.

[45] *Id.* at 4732-33, ¶ 17.

[46] *Id.* at 4733-34, ¶ 18.

general deregulatory purpose of the 1996 Act was insufficient to raise the burden of proof or level of review in Section 11.[47]

On reconsideration, the Commission should analyze the text of 202(h), as it analyzed Section 11 in the 2002 Biennial Review decision. After conducting such a review, if it interprets Section 202(h) differently than the virtually identical Section 11, it must justify the different result.

C. The Commission Need and Should Not Rely on the *Fox* Court's Interpretation of Section 202(h).

The Order relies upon the analysis of the *Fox* decision for the point that Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules.[48] However, the FCC is obligated to do its own analysis and, in so doing, is not bound by the interpretation in the *Fox* decision.

The *Fox* court's conclusion that Section 202(h) "carries with it a presumption in favor of repealing or modifying the ownership rules" appears to be based on the court's interpretation of the legislative history and intent of the 1996 Telecommunications Act. At the outset of its opinion, the Court states, "[i]n the Telecommunications act of 1996 the Congress set in motion a process to deregulate the structure of the broadcast and cable television industries."[49] It then describes in detail the changes made to media ownership rules, noting that, "Finally, and most important to this case, in §202(h) of the Act, the Congress instructed the Commission, in order to continue the process of deregulation, to review each of the Commission's ownership rules every

[47] *Id.* at 4735, ¶ 21.
[48] Order at ¶ 11. The Order also cites *Sinclair*, but that decision in turn relies on *Fox*. *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 159 (D.C. Cir. 2002).
[49] 280 F.3d at 1033.

two years."[50] While the Court quotes the language of 202(h), it does not conduct any analysis which bolsters its conclusion that 202(h) is a deregulatory directive. It cites nothing further in support of an underlying legislative directive favoring deregulation.

In its Petition for Rehearing of this decision, the FCC pointed out that the:

> The Court cited no basis for this "presumption" in either the statutory language or in the legislative history of the 1996 Act. If there should be any presumption that is created by the adoption of Section 202(h), it is a presumption in favor of <u>re-examining</u> the agency's media ownership rules on a regular basis to determine if they continue to be in the public interest. The statutory language directing the FCC to "repeal or modify any regulation it determines to be no longer in the public interest" is inconsistent with a statutory presumption in favor of repeal or modification.[51]

The D.C. Circuit, in fact, granted rehearing in part. Finding that the meaning of Section 202(h) had not been fully briefed and that its decision did not turn on the precise interpretation of that section, the Court modified its earlier decision to leave the question open.[52] Under these circumstances, the Order's unquestioning reliance on the reasoning of the earlier decision was improper.

The FCC's unquestioning acceptance of an Appeals Court's interpretation of its statute is also at odds with its actions in other similar proceedings. For example, in a Declaratory Ruling on how it to classify Internet access offered by cable companies over coaxial cable, the FCC considered a decision by the US Court of Appeals for Ninth Circuit that had already addressed the appropriate statutory classification of cable modem services in *AT&T v. City of Portland*.[53] After analyzing the Court's decision, the FCC interpreted the statute in a different manner than

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[50] *Id.*
[51] FCC Petition for Rehearing or Rehearing En Banc, Fox Television Stations, Inc. v. FCC, Nos. 00-1222, et al., (Apr. 19, 2002) at 9, n.1 (emphasis in original).
[52] 293 F.3d 357, 540 (D.C. Cir. 2002).
[53] 216 F.3d 871 (9th Cir. 2000).

the Court.[54] While explicitly recognizing that the Court's conclusion contradicted its own, the FCC concluded that it was not bound by the Ninth Circuit's decision, in part because that decision "was based on a record that was less than comprehensive."[55] Similarly, in this case, the *Fox* Court's decision was not based on a comprehensive record, and thus, the FCC is not bound by it. Instead, on reconsideration, it must do its own analysis which addresses the arguments made above and in the comments.

III. THE LOCAL TELEVISION RULES FAIL TO SERVE THE PUBLIC INTEREST AND SHOULD BE REVISED TO ENSURE GREATER DIVERSITY, LOCALISM AND COMPETITION

A. The New Local Television Rules will Not Ensure Viewpoint Diversity.

The Order concludes that the Commission can relax the local television rules because "an abundance of viewpoint diversity" exists and television stations are not the only outlets contributing to viewpoint diversity.[56] However, this conclusion is not supported by the record.

Despite finding that local news is the most relevant factor in assessing viewpoint diversity, the Order does not analyze the availability of diverse sources of local news.[57] Yet, in other parts of the Order, the Commission recognizes that many television stations often do not provide local news and public affairs.[58] Moreover, it ignores record evidence that 47 percent of

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[54] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling*, 17 FCC Rcd 4798, 4831-32 (2002).

[55] *Id.* at 4831. In addition, the Commission determined that the Ninth Circuit's ruling was only in effect in the Ninth Circuit, and explicitly considered forbearing from the Ninth Circuit's holding. *Id.* at 4832, n. 218 & 4847-48,

[56] *Id.* at ¶¶ 177-78.

[57] *See id.* at ¶¶ 173-180. Nor does the Order analyze the extent of competition in local news in the section on competition. Instead, the Commission looks at competition in delivered video programming ("DVP"), that is, any type of video programming delivered to the home, without regard to whether it is news, entertainment, sports etc. *Id.* at ¶¶ 141-150.

[58] For example, in justifying the top-4 restriction, the Commission cites that 85 percent of the top 4 ranked stations offer local news. Order at ¶ 198. Obviously, this means that 15 percent of top-

all broadcast stations in the top 10 DMAs do not air local news.[59] This evidence is particularly troubling in light of the Commission's decision to allow common ownership of three television stations in several of the largest DMAs.

While outlets other than broadcast television may contribute to viewpoint diversity in some communities, the Commission makes no attempt to analyze whether in fact these other outlets provide local news and public affairs, and if so, how many people have access to them.[60] Yet, in another part of the Order, the Commission finds that DBS provide "little or no local nonbroadcast content."[61] It also questions cable as a local news source, finding that only one third of cable subscribers have access to a local cable news channel and that PEG channels have extremely low viewership.[62]

The Commission also does not inquire into whether these outlets are owned by the same firms as the broadcast stations.[63] Yet, the Commission acknowledges in another other part of the Order, that many broadcast stations also offer local websites.[64] A recent study reported in

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4 ranked stations do not offer local news. The Commission also acknowledges that home shopping stations doe not typically carry news. 422.

[59] Comparing numbers from Fox Comments, Economic Study A, News and Public Affairs Programming Offered by the Four Top-Ranked Versus Lower-Ranked Television Stations, and total number of broadcast stations from BIA Financial Network, 2003 Television Market Report, tbl. 3.

[60] Order at ¶¶ 171, 176.

[61] Order at ¶ 413.

[62] Order at ¶ 414 & n. 924.

[63] This is especially important since, as the Commission notes, ownership diversity is a good proxy for viewpoint diversity. Order at ¶ 27

[64] Order at ¶ 427. While asserting that sources other than local broadcast stations and newspapers offer news on websites, the only two examples cited, the Drudge Report and Salon, *id.*, are not sources of *local* news.

Broadcasting & Cable demonstrates that the same companies that dominate the provision of programming on broadcast stations are also major providers of cable programming. [65]

Perhaps most troubling, in claiming that other outlets are sufficient to ensure viewpoint diversity, the Order ignores that fact that due to the replacement of the current cross-ownership rules with the CML, common ownership of newspapers, radio and television will vastly increase, thus further reducing the viewpoint diversity

B. The New Local Television Rules will Not Ensure Adequate Competition.

The new rules are premised on the assertion that a market with an HHI of 1800 is sufficiently competitive.[66] Under the DOJ/FTC merger guidelines, a market with an HHI between 1000 and 1800 is considered moderately concentrated; and above 1800 is considered to be highly concentrated. Selection of the highest HHI is problematic since the rules are supposed to prevent markets from becoming excessively concentrated.

Moreover, the Commission arrives at the new limits based on the fact that a market with 6 television stations with roughly equal market share would have an HHI of 1800. It reasons that a market with 18 television stations could have 6 owners each owning 3 stations, or that a market with 12 stations could have 6 owners with 2 stations each, and the HHI would not exceed 1800. However, this analysis assumes roughly equal market shares. In reality, stations do not have roughly equal market shares. Indeed, the Commission admits as much in noting the disparity in audience size between the top four and other stations.[67] Moreover, the Commission also admits

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[65] *See* The Corporate Scoreboards: How Viewership Breaks Down by Company, Broadcasting & Cable, December 2, 2002, at 12 calculating prime time viewership of broadcast and cable networks according to their ownership.
[66] Order at ¶ 192.
[67] Order at ¶ 195.

that allowing duopolies in markets with fewer than 12 stations will result in concentrations above 1800. [68]

Thus, even in theory, the new rules will allow markets to become excessively concentrated. When the new rules are applied to actual markets, it is clear that they will allow excessive concentration. For example, in Philadelphia, for example, Viacom owns KYW-TV (CBS) and WPSG (UPN), giving Viacom a viewing share of 25%. Since there are 19 stations in this market, Viacom could also purchase fifth-ranked WPHL. Although this market is already highly concentrated, with an HHI of 2037, the newly- formed triopoly would give Viacom a 34% viewing share, and increase the HHI level by 450 points to 2487. Thus, under the DOJ Merger Guidelines, their merger would be found anti-competitive.

Philadelphia Market

Parent Company	% of Market Share	Column B Squared
C	E	H
CBS TV Stations Division	25	625
KYW-TV (18% share)		
WPSG (7% share)		
ABC Inc	26	676
NBC/GE	22	484
Tribune Broadcasting Co	9	81
Fox Television	13	169
Brunson Communications	1	1
Paxson Communications Corp	1	1
	Total	**2037**

If Viacom bought out Tribune:

Parent Company	% of Market Share	Column B Squared
C	E	H
CBS TV Stations Division	34	1156
KYW-TV (18% share)		
WPSG (7% share)		
WPHL-TV (9% share)		
ABC Inc	26	676
NBC/GE	22	484
Fox Television	13	169
Brunson Communications	1	1
Paxson Communications Corp	1	1
	Total	**2487**

The result in other cities would be similar. Indeed, many markets are already heavily concentrated under the current, more stringent ownership rules. The Little Rock, Arkansas, market has an HHI of 2590. Other cities have HHIs that border on being heavily concentrated. New York City, considered one of the most competitive markets in the country, has an HHI of

[68] *Id*. at ¶ 201.

1799. While duopolies would be forbidden in Kansas City under the previous local TV rule (since fewer than 8 independent stations would remain in the market after two stations combined) duopolies would be permitted under the new rule. Currently, Kansas City has an HHI of 1836; allowing even one duopoly in the market would push the concentration index to an HHI level of more than 2000.

Kansas City

Parent Company	% of Market Share	Column B Squared
C	E	H
Meredith Corp.	23	529
Fox Television	21	441
Hearst-Argyle	21	441
Scripps Howard Bcst	18	324
KSHB-TV (15% share)		
KMCI (3% share)		
Sinclair	7	49
TV 29 Inc	6	36
Paxson Communications Corp	4	16
	Total	**1836**

If Meredith bought Sinclair:

Parent Company	% of Market Share	Column B Squared
C	E	H
Meredith Corp.	30	900
KCTV (23% share)		
KSMO-TV (7% share)		
Fox Television	21	441
Hearst-Argyle	21	441
Scripps Howard Bcst	18	324
KSHB-TV (15% share)		
KMCI (3% share)		
TV 29 Inc	6	36
Paxson Communications Corp	4	16
	Total	**2158**

It may be that actual mergers resulting in HHIs above 1800 will be stopped by antitrust authorities. However, challenging mergers is resource intensive, and it is not clear that the DOJ has the resources to challenge all mergers that would result in excessive concentration. What is clear is that effectively deferring review to antitrust authorities is inconsistent with the Commission's own conclusion that it is not in the public interest to leave merger reviews solely to antitrust authorities.[69] Thus, the Commission should reconsider its "six owner" approach to local TV rules.

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[69] *Id.* at ¶¶ 56-58.

C. The Commission should reconsider its use of DMAs.

In recrafting the rules to ensure adequate diversity and competition, the Commission should also reconsider its decision to count all stations within a DMA regardless of whether the stations can be received throughout the DMA or whether the station's community of license is even located within the DMA.[70] The Order explains this decision on the grounds that "the majority of viewers—including those who reside in geographically large DMAs—have access to television broadcast stations that they could not view over the air because they can view the stations via cable."[71] This conclusion is factually unsupported and inconsistent with the Commission's decision to keep the "UHF discount." But more importantly, it overcounts the number of stations actually available and thus will allow mergers that can seriously diminish the diversity of local news programming available to the public.

In Phoenix, for example, two stations listed in its DMA – Flagstaff-based KBPX and Prescott-based KUSK – are not available over the air to households in the metropolitan area because the Grade B contours do not reach Phoenix.[72] Those broadcast stations' signals are not available to Phoenix-area households, except possibly via cable to which many households do not subscribe. Further, because they are licensed to different communities, any locally oriented programming would address their community of license, rather than Phoenix. Thus, these two stations contribute little, if any, to the diversity of local programming

A similar situation exists in the Miami-Ft. Lauderdale DMA. While there are 14 independent full-power TV stations, two of those stations are licensed to Key West, Florida,

[70] Order at ¶ 186 & n. 399.
[71] Order at ¶ 187.
[72] Television & Cable Factbook 2000 No. 68, at A-63, A-75.

approximately 120 miles from Miami.[73] Neither of the Key West stations has a Grade B signal contour that overlaps with the Grade B contours of any of the other stations in the market, all of which transmit from or near Miami.[74]

In addressing the problems associated with geographically large DMAs in its local TV Reconsideration Order,[75] the Commission noted that counting a station in one community when the signal does not reach a second community is at odds with the goal of establishing a minimum level of independent voices in these communities' TV markets.[76] The Commission thus modified the local TV rule to count only those stations whose Grade B signal contour overlaps with the Grade B contour of at least one of the stations in the proposed combination.[77]

In revising its local TV rule, the Commission now throws out this reasoning. The Order reverses the Commission's decision to count only stations with overlapping contours without explicit acknowledgment and without explaining why its Reconsideration decision[78] was wrong.

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[73] Review of the Commission's Regulations Governing Television Broadcasting, Memorandum Opinion and Second Order on Reconsideration, 16 FCC Rcd 1067, 1073 (2000).
[74] *Id.*
[75] Review of the Commission's Regulations Governing Television Broadcasting, Memorandum Opinion and Second Order on Reconsideration, 16 FCC Rcd 1067, 1072-73 (2000).
[76] *Id.* at 1073.
[77] *Id.* The Commission said that this was consistent with the overall goal of the local TV rule in allowing common ownership of stations with no Grade B overlap. In fact, the Commission noted that the original Order held that stations in the same DMA could form combinations, regardless of the number of voices available, providing there was no Grade B overlap. Therefore, the Commission reasoned, the converse must also be true:

> [I]f two stations with no Grade B overlap have so little impact on competition and diversity in the other's market that they should be permitted to combine, then neither should they be able to rely on the other as a source of competition and diversity in proposing to combine with a third station. *Id.*

[78] Order at ¶ 187.

D. The Commission should Reconsider the Counting of Noncommercial Stations.

The Commission should not count each noncommercial TV station as a separate station since many are simply repeating the same broadcast across the state. Under the old local television rule, stations with common ownership and duplicative programming, whether commercial or noncommercial, were not counted as independent voices.[79] The new rules no longer require independent voices, but are triggered by the total number of TV stations in the DMA.[80]

The inclusion of all noncommercial television stations leads to results that allow far more consolidation than was intended. Many sparsely populated but geographically large TV markets have statewide public broadcasting systems that repeat the same signal over several transmitters across the state. For example, Sioux Falls, SD, is counted as having 6 noncommercial stations, even though 5 are run by the South Dakota Public TV network and broadcast identical programming, causing Sioux Falls, the 112th largest DMA, to be counted as having 11 stations, or more than Detroit, Michigan, the 10th largest.[81] Similar anomalies will occur in other communities, including markets in Iowa, Ohio, Kentucky, Michigan, Nebraska, New York, and Vermont.[82]

By over-counting the actual number of stations, the rules permit unlimited cross ownership in these markets. Since Sioux Falls is considered to have more than 8 TV stations, the Cross Media Limits are lifted, allowing the newspaper to acquire more commercial TV and radio

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[79] 47 C.F.R. § 73.3555(b); Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Station Review of Policy and Rules, 14 FCC Rcd 12903, 12907-08 (1999).
[80] Order at ¶ 186.
[81] FCC Commissioner Jonathan S. Adelstein Calls on FCC to Fix Anomaly in New Media Rules Before They Take Effect, FCC Press Release (rel. July 15, 2003).
[82] *Id.*

stations than should be permissible. The Commission should either exclude noncommercial stations from television markets or make provisions to not count stations that have duplicative programming.

E. The Commission should Reconsider its Modification of the Waiver Tests.

Under the 1999 local television rules, waivers were limited to cases where the applicant could show that a station had failed, was failing or unbuilt, and no out-of-market buyer could be found. The Order eliminates both of these requirements,[83] and explicitly anticipates granting waivers of the top-four ranked restriction in markets with 11 or fewer television stations.[84]

UCC *et al.* urge that the Commission reconsider its decision to eliminate the requirement of first seeking an out-of-market buyer. The Commission's reason for eliminating the requirement is that it agrees "with NAB that the efficiencies associated with operation of two same-market stations, absent unusual circumstances, will always result in the buyer being the owner of another station in that market."[85] This change completely undermines any opportunity for new entry. The opportunity for new entry is important to foster competition, diversity and innovation. As the Commission notes in another part of the Order, "in radio markets, barriers to entry are high because virtually all available radio spectrum has been licensed," and "numerical limits help to keep the available capacity from becoming 'locked up' in the hands of one or a few owners, and thus help prevent the formation of market power in local radio markets."[86] The same reasoning applies with even greater force to local television markets. Not only are there fewer television licenses available than radio licenses, but television is more expensive to

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[83] *Id*. at ¶ 224-225.
[84] *Id*. at ¶ 227.
[85] Order at ¶ 225.
[86] *Id*. at ¶ 288.

operate. Thus, the Commission should not further raise entry barriers for new entrants by making it easier for companies already in the market to acquire even more stations.

UCC *et al.* also ask the Commission to reconsider its decision to consider the effect of a proposed waiver on a stations' ability to complete the transition to DTV.[87] Since virtually every applicant can argue that allowing the proposed merger will help it to complete the transition to DTV, this factor potentially renders the waiver standard meaningless.

Finally, UCC *et al.* support the Commission's decision to require merging parties who commit to significantly increase news and local programming to demonstrate at license renewal that the public interest benefits are being fulfilled.[88] However, we believe that all stations, not just those acquired as a result of a waiver, should have to show at renewal how they have served the public interest through their news and local programming.

IV. THE LOCAL RADIO RULE FAILS TO SERVE THE PUBLIC INTEREST AND SHOULD BE REVISED TO ENSURE GREATER DIVERSITY, LOCALISM AND COMPETITION

The Order retains the former the numeric ownership limits while modifying the market definition and deciding to count noncommercial stations. The Commission finds claims that current radio market concentration levels are acceptable despite its own staff analysis and other evidence in the record that concentration is exceedingly high.[89] On reconsideration, the Commission should revise the local radio rules to ensure greater competition, adequate local service and greater diversity of viewpoints.

[87] *Id*. at ¶ 229.
[88] *Id*. at ¶ 230.
[89] UCC did an extensive analysis on ownership trends and HHI levels in radio markets from 1993 to 2001. It found a tremendous decrease in ownership diversity and markets that were becoming heavily concentrated. Comments of UCC, MM Docket No. 01-317 ("UCC Radio Comments"), Attach. 1 & 2 (filed Mar. 27, 2002).

A. The Numerical Limits Should be Revised to Promote Greater Actual Competition.

The Commission finds that the current local radio rule permits concentration levels that are a "reasonable and necessary balance" for radio broadcasting and declines to raise or lower the numerical ownership limits.[90] Unlike the HHI analysis used in devising the new local TV rule, which was designed to ensure a minimum of six owners, the local radio rule analysis inexplicably relies on a general competition theory suggesting that a market with five or more relatively equal-sized radio firms provides sufficient competition.[91]

Even using the five firm test, the current rules do not ensure that level of competition. While the Commission claims there are "many" markets with about five or six radio stations of roughly equal size in many radio markets,[92] the UCC Radio Study found that typically the top two station owners dominate markets.[93] Indeed, there may be very few radio station owners of measurable size outside of the top two or three radio stations. In Little Rock, Arkansas, the top two radio station owners, Clear Channel and Infinity Broadcasting, control 63.7% of the local commercial audience share.[94] The next closest radio station owner in size, Signal Media, has a local commercial share of 8%.[95]

The UCC Study also found that none of the 33 Arbitron Metro Markets studied had HHI levels below 1000. In fact, over one-half of the radio markets had an HHI over 3000—a level far

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[90] Order at ¶ 288-89.
[91] *Id*. at ¶ 289.
[92] *Id*. at ¶ 289.
[93] In New York City, the top two radio station owners (Clear Channel and Infinity Broadcasting) controlled 45.4% of the local commercial audience share. UCC Radio Comments, Attach. 1 at 5. In Los Angeles, the top two radio station owners (again Clear Channel and Infinity Broadcasting) controlled 45.3% of the local commercial audience share. *Id.* at 9.
[94] BIA Financial 2001 Radio Market Report, Metro Rank 85.
[95] *Id*.

beyond that of a highly concentrated market.[96] Thus, on reconsideration, the FCC must explain how the current tiered approach ensures adequate competition, and if cannot, it must lower the maximum number of stations that can be owned within a local market or reinstitute the "flagging policy."

B. While the Use of Arbitron Markets is Appropriate, the FCC Should Not Count Noncommercial Stations.

The Order concludes that "[a]lthough we reaffirm the ownership tiers in the local radio ownership rule, …it is not necessary in the public interest to exclude *noncommercial* radio stations in determining the size of the radio market." [97] Because of the relatively large number of noncommercial radio stations, counting these stations for purposes of determining the cap has the effect of allowing additional common ownership in many markets. For example, because San Diego has 42 commercial radio stations, one company can control up to 7 radio stations. However, by counting the 12 noncommercial stations, the radio station cap increases to 8. As demonstrated in the attached Exhibit, the inclusion of noncommercial radio stations in the Arbitron market tally effectively increases the number of stations that one entity can own in many markets. See Exhibit 1.

Further, by counting noncommercial stations, purchases that would be prohibited by a commercial station-only rule are permissible. For example, in Raleigh-Durham, N.C., and Knoxville, Tenn., the largest radio station owners (Clear Channel and Citadel respectively) will be able to pick up one more FM station in each market under the new rule, acquisitions that would be prohibited if only commercial stations were counted.

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[96] UCC Radio Comments at 18.
[97] *Id.* ¶295 (emphasis added). UCC *et al.* also note that the FCC gave no notice of this proposed change in violation of the APA's notice requirements.

Moreover, including noncommercial stations is inconsistent with the Commission's rationale for using Arbitron markets. The Commission adopted the Arbitron market definition in part to have a more "rational and coherent methodology" and to "promote more effectively [the Commission's] competition policy goals."[98] By including noncommercial stations, which are not included in the Arbitron "Book," the Commission defeats the purpose of using Arbitron markets as an administratively convenient tool in speeding analysis of radio transfer applications. Further, it defeats its use as a practical and available resource for the public in examining market concentration and potential radio station acquisitions.

V. THE CROSS MEDIA LIMITS FAIL TO SERVE THE PUBLIC INTEREST

On reconsideration, the FCC should reinstate the newspaper broadcast cross-ownership rules because its analysis that the rule no longer serves the public interest is not supported by the record and the replacement CML is based on so many flawed assumptions that it lacks any validity.

A. The Commission's Conclusion that the Newspaper-Broadcast Cross Ownership Rule is No Longer Necessary in the Public Interest is Not Supported by the Record.

1. The Commission's Conclusion that the Rule is Unnecessary to Promote Diversity is Arbitrary and Capricious.

The Commission arbitrarily and capriciously reverses the long-standing conclusion, affirmed by the Supreme Court in *FCC v. NCCB* that that the newspaper-broadcast cross ownership rule is necessary to promote diversity.[99] Specifically, the Commission concludes that

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[98] Order at ¶ 249

[99] *Id*. at ¶¶ 355-367.

> Suffice to say, although there is evidence to suggest that ownership influences viewpoint, the degree to which it does so cannot be established with any certitude. In order to sustain a blanket prohibition on cross-ownership, we would need, among other things, a high degree of confidence that cross-owned properties were likely to demonstrate uniform bias. The record does not support such a conclusion. Indeed, as the market becomes more fragmented and competitive, media owners face increasing pressure to differentiate their products, including by means of differing viewpoints. While such differentiation may occur, however, our analysis does not turn on that premise, and it is not determinative of our decision with respect to our current newspaper/broadcast cross-ownership rule. Our analysis turns, rather, on the availability of other news and informational outlets. Thus, while we do not dispute that a particular outlet may betray some bias, particularly in matters that may affect the private or pecuniary interest of its corporate parent (*e.g.,* such as when an outlet has an interest in a real estate transaction or is being criticized in an op-ed), such anecdotes do not show a pattern of bias in the vast majority of news comment and coverage where such self-interest is not implicated. Nor, moreover, do such incidents mean that the public was left uninformed about the situation by other available media. Therefore, it would seem that the remedy for any such "bias" is the provision of antagonistic viewpoint we seek to advance. [100]

This paragraph is quoted in full because it illustrates the inconsistency and irrationality in the Commission's reasoning. First, the Commission never explains why it requires a higher degree of certitude that ownership influences content for the purpose of newspaper-broadcast rule than for all of its other ownership rules. At the outset of the Order, the Commission finds that:

> the balance of the evidence, although not conclusive, appears to support our conclusion that outlet ownership can be presumed to affect the viewpoints expressed on that outlet. We therefore continue to believe that broadcast ownership limits are necessary to preserve and promote viewpoint diversity. A larger number of independent owners will tend to generate a wider array of viewpoints in the media than would a comparatively smaller number of owners.[101]

And even in the section on the newspaper-broadcast cross-ownership rule, the Commission observes that:

[100] *Id*. at ¶ 364.
[101] *See Id*. at ¶ 27. *See also id*. at ¶ 366, "We agree that diversity of ownership can promote a diversity of viewpoints and recognize that absent the current rule there will be some consolidation."

> it is hardly surprising, nor do we find it troubling, that newspaper owners use their media properties to express or advocate a viewpoint. To the contrary, since the beginning of the Republic, media outlets have been used by their owners to give voice to, among others, opinions unpopular or revolutionary, to advocate particular positions, or to defend, sometimes stridently, social or governmental institutions. Our broadcast ownership rules may not and should not discourage such activity. Nor is it particularly troubling that media properties do not always, or even frequently, avail themselves to others who may hold contrary opinions. Nothing requires them to do so, nor is it necessarily healthy for public debate to pretend as though all ideas are of equal value entitled to equal airing.[102]

The Commission cannot rationally claim that media owners use their media outlets to express opinions or advocate positions, but that owners of two types of media outlets will not use those cross-owned media to express opinions and advocate positions. UCC *et al.* believe it is beyond doubt, and the record so demonstrates, that ownership affects viewpoints. There is nothing inherently wrong with media owners using their properties to express their views. However, the fact that media owners can and do determine what stories are covered and what views are presented, is precisely why a meaningful cross-ownership rule is still necessary to promote the public interest in having access to diverse viewpoints.

Second, in admitting that "we do not dispute that a particular outlet may betray some bias, particularly in matters that may affect the private or pecuniary interest of its corporate parent," and yet concluding that "such anecdotes do not show a pattern of bias in the vast majority of news comment and coverage where such self-interest is not implicated," the Commission irrationally discounts bias. Of course, bias will be most evident where self-interest exists. But even where self-interest not a factor, however, different owners, even those making good faith efforts to be impartial, will make different choices about what to cover and how to present issues. That is why diversity of ownership is so important.

[102] *Id*. at ¶ 352 (footnotes omitted).

Third, the Commission's conclusion that the existence of bias does not "mean that the public was left uninformed about the situation by other available media… the remedy for such 'bias' is the provision of antagonistic viewpoint we seek to advance" is not unsupported by record. But more importantly, it is far less likely that antagonistic viewpoints will be presented under the new rules. If the same entity owns the only newspaper, the television station or stations with the only local news programming and the only all-news radio station, a combination that is permitted in most markets under news rules, no one else may be able or willing to present an antagonistic viewpoint and the public will be left uninformed.

2. The Conclusion that the Newspaper Broadcast Cross-Ownership Rule is Not Necessary to Ensure Comprehensive Local News Is Undermined by the Failure to Newspaper-Broadcast Combinations to Cover Important Local Stories.

Not only is the Commission's analysis of localism inappropriately limited to assessing the quantity and quality of local news, see *supra* at I(C)(2), but its conclusion that joint ownership of newspapers and broadcast stations is belied by an examination of the coverage of this very proceeding. Ironically, the Commission cites as an example of the localism benefits of cross-ownership Gannet's self-serving claim that in Phoenix, Arizona, where it holds a grandfathered newspaper/television combination, "the quantity and diversity of area news coverage it provides has increased as a result of its ability to leverage the combined resources of the two outlets."[103] Yet, despite these combined resources, neither the paper nor the television managed to cover the Arizona Forum on Media Ownership held in Phoenix on April 7, 2003.[104]

[103] Order at ¶ 348.

[104] Gannett Co., Inc., which owns the top newspaper in Arizona, the Arizona Republic, and the top broadcast station in the Phoenix market, declined an invitation to participate in the forum, offering only a statement reiterating its position that the "broadcast cross ownership rule is

Similarly, of all the media in San Francisco, only the independent television station, KRON-TV, covered the Northern California Hearing on Media Ownership on April 26, 2003, where Commissioner Adelstein spoke.[105] These hearings are examples of the types of important local events that were not covered by many major media and would not would not have received any coverage at all but for the presence of other independently owned media.

3. The Commission's Conclusion that the Rule is not Necessary to Promote Competition Fails to Address Competition in Local News.

The Order concludes that the newspaper broadcast cross ownership rule is not necessary to promote competition because most advertisers do not view newspaper and television advertising as substitutes.[106] UCC *et al.* do not disagree that the conclusion that television and newspapers are not significant competitors in terms of the sale of advertising. But the Order provides no analysis in the one market where newspapers and television stations clearly do

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outmoded and should be repealed." The Arizona Forum on Media Ownership, April 7, 2003, available at http://www.benton.org/initiatives/ownership/azforum.htm. The Forum included high profile participants like Commissioner Copps, ABC News 20/20 co-anchor Hugh Downs, and Arizona Attorney General Terry Goddard. *Id.* Over 150 members of the public participated in person and hundreds more accessed the forum via the internet. *Id.* In fact, the Forum was an extremely newsworthy event that Gannett-owned outlets did not cover. In an opinion piece three days after the forum, the editor of Arizona's other newspaper, the East Valley Tribune, which did cover the forum, wrote "Supporters of the rule change say that the integrity of news coverage would not be harmed… What does the absence of forum coverage in the Arizona Republic say to you?" *Republic Mum When Its Parent Firm's Interests are in Question*, East Valley Tribune, April 10, 2003.

[105] *See* Declaration of Jeff Perlstein, Executive Director of Media Alliance, Motion to Stay, Ex. D. *Media Alliance v. FCC*, 9th Cir. No. 03-72910 (filed Aug. 13, 2003), describing how "[a]t the hearing, FCC Commissioner Adelstein remarked that "I don't think ever in the history of the Federal Communication Commission—70 years—has a Federal Communications Commissioner come to hear from the people of this city about an issue that affects them on this level ....Yet it's going largely unnoticed by the media." The Bay Area's major newspaper, the San Francisco Chronicle, also failed to cover the hearing, only printing a brief announcement before the event."

[106] Order at ¶ 341.

compete – the provision of local news. On reconsideration, the Commission must undertake this crucial analysis.

B. The Diversity Index, on which the CML is based, is Fundamentally Flawed.

UCC *et al*. believe that a proper analysis of all of the relevant factors and evidence in the record would lead to a conclusion that the former newspaper-broadcast cross-ownership rule should be retained, perhaps with some minor modifications. Nonetheless, should the Commission conclude otherwise and decide to retain the CML, it must revise the CML after correcting the fundamental flaws on which it is premised.

The CML prohibits cross-ownership in markets with 3 or fewer television stations and limits cross-ownership in markets with 4-8 television stations. The Commission derives these numbers by using the Diversity Index (DI) to identify "at risk" markets. The DI is in turn derived from the HHI.

1. The Commission fails to show that HHI is Relevant to the Analysis of Diversity.

At the outset, we note that the HHI is used by antitrust agencies to analyze the economic effects of specific proposed mergers. The Commission has not shown that it is a useful tool for developing general rules designed to protect diversity, competition and localism. It is inappropriate for the Commission to use HHI for this purpose for several reasons. First, the marketplace of ideas is a metaphor, not an economic market, and it does not operate in the same manner. As UCC, CFA and many other commenters pointed out, ideas are not the same as peanuts or potatoes.[107] Moreover, the Commission's economic analysis takes no account of well-recognized positive and negative externalities and market failures that occur in media markets.[108] Even if it was appropriate to use HHI to assess diversity, the rules based on the DI allow greater concentration than typically allowed under HHI. If anything, the rules should ensure less concentration in light of significant entry barriers and the importance of having a diversity of viewpoints in a democratic society.

2. The Diversity Index is Based on So Many Flawed Assumptions that it Lacks Any Validity.

Even if the HHI could reasonably be used to assess diversity, the Commission's application of it in this context is arbitrary and capricious. Now that the public has had an opportunity to comment on the DI for the first time, it is clear that many of the assumptions upon which it is based are incorrect or unsupported. The cumulative effect of these problems is to render the DI totally useless for assessing actual diversity and developing rules.

To construct the DI, the Commission first weights different kinds of media (television, daily and weekly newspapers, radio, and internet) based on surveys of what people say they use to get news and information. Within each type of media, the Commission counts the number of separately owned media, and attributes each the same market share. It then adds the cross-owned market shares together, and sums the squares of the market share to get a number. There are many problems with this approach.

First, although the Commission says it has weighted the different types of media based on actual usage, the survey merely reports what people say they use, which may not be the same as

[107] UCC Reply Comments at 10; CFA *et al.* Comments at 20-39 and at n.8, citing Edwin C. Baker, *Media Concentration: Giving Up On Democracy*, 54 Fla. L. Rev. 839, 916 (2003).
[108] *See, e.g., Policies and Rules Concerning Children's Television Programming,* 11 FCC Rcd 10660, ¶¶ 29-34 (1996).

actual use. Moreover, it makes no sense to include the Internet as a medium since Internet providers (telephone companies and cable companies) either may not or generally do not exercise editorial control over the content available on the Internet. And, as the Order recognizes, the major providers of news and information via the internet are the same television stations and newspapers.[109] Including the internet causes the market shares of other media providers to appear lower than they actually, thus lowering the DI numbers.

Second, when used to assess mergers, the HHI is calculated using actual market share. Yet, instead of using actual market share within media categories, the DI attributes equal market shares to all providers. This does not reflect reality. Since actual market share data is available, it is arbitrary for the Commission not to use it. Moreover, treating all voices equally within a category is inconsistent with the Commission's decision to retain the top-4 restriction for local television and the dual network rule. Moreover, treating all voices equally fails to take into account the impact on diversity of allowing a monopoly newspaper to also own a television station in the same market.

Third, the Commission acts arbitrarily in deciding what sources to count. For example, it counts all full power radio and television stations, regardless of whether they provide any news at all, e.g. home shopping. And it counts all full power radio and television stations regardless of whether they reach the entire DMA. And it counts all full power radio and television stations even though they may not even garner a reportable market share. Yet, it excludes some sources, such as public, educational and governmental access channels, and local cable news channels, because they are not available to all or attract very little viewing. UCC *et al.* agree that the latter

[109] Order at ¶ 365 n. 836.

should not be counted, but neither should radio and television stations that provide no local news or have little viewership.

Fourth, in assessing the significance of the numbers, the Commission arbitrarily departs from the DOJ/FTC guidelines that mergers resulting in an increase of 100 points should be reviewed.[110] Instead, it decides that only mergers increasing the index by 400 points should be of concern.[111] The Order explains that it "found no case in many years in which DOJ has filed suit to block a merger that produced less than a 400 or more HHI change. *Id.* But simply because the DOJ declined to file suit, does not mean that any merger resulting in less than a 400 point increase in the public interest. Presumably, the DOJ followed its guidelines and carefully reviewed the specifics of such mergers to determine that they did would nonetheless not result in a substantial lessening of competition. Moreover, it is possible the DOJ might decide not to file suit against mergers with a negative impact on competition due to resource constrains or litigation strategy concerns. It is therefore not reasonable for the Commission to decide not even to review the specifics of mergers raising the DI more than 100 but less than 400 points. Yet, using the 400 point standard, it concludes that "cross-media combinations involving newspaper and television, newspaper and radio, or radio and television properties do not produce a change in the DI of anything even approaching that magnitude other than in markets with three or fewer television stations."[112]

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[110] U.S. Department of Justice and Federal Trade Commission, Revised 1992 Horizontal Merger Guidelines §1.51 (rev. 1997) state that where post merger HHI is over 1800, an increase of more than 100 "is presumed likely to create or enhance market power or facilitate its exercise," while in markets with a post-merger HHI between 1000 and 1800, and increase of 100 points would "potentially raise significant competitive concerns."
[111] Order at ¶ 450.
[112] *Id.*

In sum, unless and until the Commission can construct a DI that realistically accounts for the actual effects of cross media mergers and protects the public interest in being exposed to diverse viewpoints on important public issues, it should continue apply the newspaper-broadcast cross-ownership rule.

VI. THE 45 PERCENT AUDIENCE LIMIT FAILS TO SERVE THE PUBLIC INTEREST AND SHOULD BE REVISED TO ENSURE GREATER DIVERSITY, LOCALISM AND COMPETITION

A. The Commission's Conclusion that the 35 Percent Limit is No Longer in the Public Interest is Flawed.

The Commission's conclusion that the 35 percent national audience limit is no longer in the public interest is based on faulty and incomplete analysis. The Order's conclusion that the limit is not needed to promote diversity, which merely reaffirms the FCC's earlier 1984 conclusion, is arbitrary and capricious because it fails to address the fact that in 1984 Congress rejected this argument, and fails to reassess this conclusion in light of changed circumstances.[113] Its competition analysis is flawed, *inter alia*, because it is based on hypothetical rather than actual market shares.[114] And its analysis of localism is deficient because it fails to consider all of the traditional concerns that fall under the concept of localism. *See supra* at I(C)(2).

The Order concludes that a 45 percent cap – rather than the former 35 percent cap -- is necessary to promote localism on broadcast television.[115] While UCC *et al.* agree that a cap is necessary to promote localism, the Commission's reasons for raising the cap are irrational.

The Commission finds that:

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[113] *Id*. at ¶ 534. It does not even cite UCC's comments which showed how the premises underlying the 1984 conclusion were no longer valid and how the limit promoted diversity in local markets. UCC Comments at 47-55.
[114] *See Id*. at ¶ 523 concluding that HHI of the program production and acquisition market is in moderately concentrated range using hypothetical program expenditure figures.
[115] Order at ¶ 539.

> The evidence before us demonstrates both that network affiliates have economic incentives more oriented towards localism than do network-owned stations, and that affiliates act on those incentives in ways that result in networks delivering programming more responsive to their local communities (in the judgment of the affiliate) than they otherwise would. … The two ways in which affiliates can promote localism are by collective negotiation to influence the programming that the networks provide and by preemption by an individual station owner to provide programming better suited to its community.[116]

Nonetheless it concludes that the audience cap can be safely raised on the grounds that "the largest network station owners [Fox and Viacom] possess no greater bargaining power – as measured by prime time preemption – than the smallest network station owner."[117]

The Commission's approach is irrational in at least two different ways. First, by focusing only on preemption rates, it ignores its own finding that affiliates also use collective negotiation to ensure locally-responsive programming.[118] It is logical to assume that affiliates of the network fewest owned and operated stations would have greater relative influence in negotiations and thus would not find it necessary to pre-empt as often. Second, although the Commission acknowledges that comparing the pre-emption rates of network owned stations versus non-network owned affiliates would yield a "more accurate assessment," it declines to get the data necessary for this assessment.[119]

B. The Commission Should Reconsider its Decision to Retain the UHF Discount.

Another problem with the 45% limit is that it is in reality a 90% limit, due to the decision to continue the obsolete UHF discount. The UHF discount, which allows television station owners to exceed even the 45 percent limit, attributes only 50 percent of the audience reached by

[116] *Id*. at ¶ 546.
[117] *Id*. at ¶ 558.
[118] An example of such collection negotiation occurred when CBS affiliates convinced the network to schedule the Victoria's Secret Fashion Show for a later time period. *Id*. at ¶ 453.
[119] *Id*. at ¶ 560.

VHF stations to UHF stations. Although the Commission acknowledges that 86 percent of households receive both UHF and VHF television by means of cable or satellite, it nevertheless retains the UHF discount because it finds that UHF stations have a smaller service area than VHF stations and it is harder for them to qualify for cable carriage and thus may be unavailable to homes that subscribe to cable.[120]

This decision is arbitrary and capricious because the Commission does not discount UHF stations for purposes of the local television limits or CML. Instead, regardless of actual signal reach or audience rating, UHF stations are counted the same as VHF stations, because the Commission finds that "[g]enerally, cable systems carry all broadcast stations assigned to the DMA in which they are located."[121] Whether UHF stations are carried throughout a DMA is a factual question, but the Commission arbitrarily and capriciously assumes the facts to be whatever serves its purpose, even if those assumptions are diametrically opposed in different parts of the Order.

For example, Commissioner Martin implicitly recognized the irrationality of retaining the UHF discount, noting that the text of the Order was changed after its adoption to add "discussions further justifying … the disparate treatment of UHF stations in our local and national ownership rules."[122] However, each of the purported justifications is unsupported and/or inconsistent with other parts of the Order. First, the Commission points out that roughly 30 percent of television sets are not connected to MVPD services.[123] But it does not explain why this figure, rather than the 14 percent of homes that do not have MVPD service, is what matters. Second, it finds that weaker signals make it more difficult for UHF stations to qualify for cable

[120] *Id*. at ¶¶ 586-87.
[121] *Id*. at ¶ 146. *See also id*. at ¶ 187.
[122] Separate Statement of Commissioner Martin at p.2 n.1.
[123] Order at ¶ 587.

and DVS carriage and that noncarriage effectively renders UHF stations unavailable to homes in the MVPD's service area.[124] However, this claim directly contradicts the Commission's basis for counting all UHF stations as being available throughout a DMA for purposes of the local television rule and CML.[125] Third, the Commission asserts that UHF stations generally receive lower ratings than VHF stations.[126] Even if this is true, lower station profitability is not a relevant public interest concern. It may be that the lower ratings simply reflect, as the Commission notes in other places, that the UHF stations provide less desirable programming. Finally, the Commission's claim that the UHF discount necessary to promote new entry and competition among networks[127] is not supported by the record. Here, the Order cites Paxson's assertion that the UHF discount enhanced its ability to launch a new broadcast network. While that may have been true for Paxson, retaining the UHF discount will be unlikely to permit the creation of additional networks because there are so few television stations remaining that are not already part of a network.[128]

[124] *Id*.
[125] *Id*. at ¶ 230.
[126] *Id*. at ¶ 588. It also asserts that UHF stations require greater electrical power to operate than VHF stations. Of course, the cost of operating stations will vary depending on other factors such as labor cost, the need to construct specialized antennae to protect the environment or alleviate interference, or for other reasons, but the Commission does not try to account for these factors in the ownership rules.
[127] *Id*. at ¶ 589.
[128] We further note that Paxson may not remain an independent network for long. Press reports indicate that Paxson is pressing NBC -- which already owns a thirty-three percent share of Paxson and has options to buy the rest -- to purchase the remainder. Steve McClellan, *FCC Action Begins the TV Dealmaking Dance*, Broadcasting & Cable, June 9, 2003. This sale would not be permitted under the 35 percent cap, but would be permitted under the 45 percent cap if the Commission retains the UHF discount.

VII. THE COMMISSION SHOULD RECONSIDER ITS DECISION NOT TO RESERVE TIME FOR INDEPENDENTLY PRODUCED PROGRAMMING

The Commission should reconsider its refusal to impose requirements that preserve a certain percentage of programming time for independent producers.[129] Although the Commission questions whether this issue is within the scope of this proceeding, providing opportunities for independent producers furthers the public interest by promoting diversity, competition, and innovation. Moreover, the issue of access for independent producers is closely related to questions of ownership structure and was the subject of extensive public comment, unlike some other proposals the Commission adopted without any public notice, as well as one of the Commission staff studies.[130] But if on reconsideration the Commission still finds that this issue is outside the scope of this proceeding, it should promptly issue a Further Notice of Proposed Rulemaking.

CONCLUSION

For the foregoing reasons, UCC *et al.* urge the FCC to engage in a thorough and serious reconsideration of the all of the broadcast ownership rules.

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[129] Order at ¶¶ 640-56.

[130] Mara Einstein, Program Diversity and the Program Selection Process on Broadcast Television Networks (Sept. 2002).

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Exhibit 1

New Local Radio Ownership Rule Weakened by Including Noncommercial Stations

The 1996 Telecommunications Act limits local radio ownership based on the number of commercial stations in particular markets, categorizing markets in four size-based ownership brackets. For example, in a market with 45 or more commercial radio stations, a company may own 8 stations, only 5 of which may be in one class, AM or FM; while in markets with 14 or fewer radio stations, a company may own 5 stations, only 3 of which may be in one class, AM or FM.

The chart below shows that including noncommercial stations raises the radio station ownership limit in several markets. Other markets may be similarly affected.

City[131]	# of Stations[132]	W/Noncom Stations[133]	Max W/Com Stations Only	Max W/Noncom
Detroit (6)	42	61	7 total (4 in one class)	8 total (5 in one class)
San Diego (16)	42	54	7 total (4 in one class)	8 total (5 in one class)
Minneapolis (17)	41	55	7 total (4 in one class)	8 total (5 in one class)
Tampa (21)	44	50	7 total (4 in one class)	8 total (5 in one class)
Denver (23)	42	48	7 total (4 in one class)	8 total (5 in one class)
Portland, Ore. (25)	43	54	7 total (4 in one class)	8 total (5 in one class)
Sacramento (27)	40	45	7 total (4 in one class)	8 total (5 in one class)
Indianapolis (40)	29	40	6 total (4 in one class)	7 total (4 in one class)
Raleigh, N.C. (48)	39	47	7 total (4 in one class)	8 total (5 in one class)
Buffalo (50)	27	32	6 total (4 in one class)	7 total (4 in one class)
Albany (61)	40	54	7 total (4 in one class)	8 total (5 in one class)
Knoxville, Tenn. (72)	39	45	7 total (4 in one class)	8 total (5 in one class)
Greenville, N.C. (84)	39	45	7 total (4 in one class)	8 total (5 in one class)
Des Moines (92)	27	34	6 total (4 in one class)	7 total (4 in one class)

[131] Market rank based on the BIA Financial Network Radio Market Report for 2001.
[132] Market size based on Broadcast & Cable Yearbook for 2001which did not include noncommercial stations in the Arbitron markets.
[133] Market size based on Broadcast & Cable Yearbook for 2002-03 which included both commercial and noncommercial stations in the Arbitron markets.